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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996:)
)
Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other Customer)
Information)

CC Docket No. 96-115

BELLSOUTH COMMENTS

BELLSOUTH CORPORATION

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SUMMARY

Rules adopted in the *Second Report and Order* are scheduled to become effective May 26, 1998. Certain of those rules, more so than others, will cause severe disruptions in carriers' marketing practices that this Commission has previously found to be beneficial to American consumers. Additionally, these rules present substantial implementation complexities given their present effective dates. Accordingly, BellSouth supports the two petitioners' requests for interim relief from those rules pending further consideration of their merits.

Specifically, BellSouth supports the requests for interim relief from Rule 64.2005(b)(1) for both CMRS providers and wireline carriers. Information services, such as voice messaging, and CPE have always been perceived to be integrated components of a wireless service offering, whether viewed from a technological, marketplace, or customer perspective. Likewise, voice messaging with wireline services is indistinguishable in customers' minds from other call control features. Finally, specialized CPE that is necessary to make a service work should be considered to be within a customer's total service relationship with a carrier. Relief from Rule 64.2005(b)(1) should be granted while the Commission revisits these issues.

The Commission also should grant interim relief from Rule 64.2005(b)(3), which prohibits use of CPNI in winback situations. The present prohibition deprives American consumers of the benefits of actual head-to-head competition and deprives carriers of beneficial use of their business assets. The Commission should delay the effect of this rule until it has been reconsidered.

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BELLSOUTH COMMENTS

BellSouth Corporation, for itself and its affiliated companies ("BellSouth"), hereby submits comments on the respective petitions of CTIA¹ and GTE² asking the Commission to defer, stay, or forbear from enforcement of certain aspects of the Commission's *Second Report and Order*³ in this proceeding. For the reasons set forth herein, BellSouth supports petitioners' requests for temporary relief.

I. Introduction.

In the *Second Report and Order*, the Commission adopted rules reflecting its interpretation of Section 222 of the Communications Act.⁴ That section addresses uses by carriers of "customer proprietary network information" ("CPNI") that carriers have about their

¹ CTIA Request for Deferral and Clarification, CC Docket 96-115 (filed April 24, 1998).

² GTE Petition for Temporary Forbearance or, In the Alternative, Motion for Stay, CC Docket 96-115 (filed April 29, 1998).

³ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket 96-115, CC Docket 96-149, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 98-27 (released February 26, 1998) (*Second Report and Order*).

customers' telecommunications services. Among the rules adopted, the Commission prohibited carriers' use of CPNI for marketing CPE and information services to their customers, absent affirmative approval of such use from the customer.⁵ The Commission also prohibited carriers from using CPNI in "winback" programs after a customer has left for another carrier.⁶ These rules are presently set to become effective on May 26, 1998.⁷

As CTIA and GTE indicate in their respective petitions (and as BellSouth can confirm), these aspects of the Commission's *Order*, as well as others, will be subjects of petitions for reconsideration of the *Order* that will be filed May 26, the same day these requirements are to go into effect, or of petitions for other forms of relief (*e.g.*, forbearance). These requirements, *more* than others, however, impose new requirements on carriers that will cause material disruptions in marketing practices in which carriers have been engaged for years and that this Commission has previously found to be *beneficial* to consumers. The petitions also provide preliminary, but credible, demonstrations that the rules adopted are neither required by the Act nor supported by public policy.

Moreover, because these new rules materially alter the marketing rules under which carriers (especially CMRS carriers) have operated for years, and do so in ways that run counter to intuitive and market-based understandings of customers' expectations, implementation of

⁴ 47 U.S.C. §222. The Communications Act of 1934, 47 U.S.C. §§151 *et seq.* ("Communications Act" or "Act").

⁵ *Second Report and Order*, at ¶¶ 71, 77. *See also* 47 C.F.R. § 64.2005(b)(1) (Appendix B to *Second Report and Order*).

⁶ *Second Report and Order* at ¶ 85. *See also* 47 C.F.R. § 64.2005(b)(3) (Appendix B to *Second Report and Order*).

⁷ *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 63 Fed. Reg. 20326 (1998) (to be codified at 47 C.F.R. pts. 22 and 64).

these rules is made extremely complex. BellSouth is expending substantial effort and resources in training and other compliance programs to ensure that marketing personnel in all of its channels of distribution are familiar with and *understand* the limitations imposed on their contacts with customers by the new rules. For example, BellSouth's effort extends to sales agents in retail outlets who are not even under BellSouth's direct control or employment. Due to the scope, complexities, and time demands of this undertaking, BellSouth finds added reason to support petitioners' requests for interim relief.

Because of the needless disruption these requirements would cause, the material possibility that they could be modified or eliminated on reconsideration (or through other relief), and the practical implementation complexities of the May 26 deadline, BellSouth supports the petitioners' respective requests for relief from these requirements pending further consideration of the issues on the merits.

II. Relief is Appropriate, Whether by Deferral, Forbearance, or Stay.

CTIA and GTE have requested relief following different procedural paths. CTIA requests "deferral" of the effective date based on the Commission's general authority to establish effective dates of its rules.⁸ GTE requests interim forbearance under the Commission's Section 10 authority or, in the alternative, a stay based on the Commission's general public interest authority and obligation. Any of these procedures provides an appropriate vehicle for relief, and petitioners have made the requisite showing under each of them.

⁸ As the principal trade association of the wireless industry, CTIA limits its request for relief to the Commission's requirements as they apply to CMRS carriers. However, the Commission has made clear that the rules adopted, and necessarily their effective dates, apply with equal force to all carriers. Accordingly, CTIA's arguments in support of deferral as an appropriate procedural vehicle for relief apply with equal validity with respect to the rules as applied to wireline carriers, since the very same rules and effective date are at issue.

As CTIA shows, the Commission has inherent authority to establish the effective dates of rules it adopts. The only limitation on the Commission's discretion is that the Commission generally may not make rules effective *less* than thirty days after publication in the Federal Register.⁹ Thus, the Commission retains the discretion to make its rules effective *more* than thirty days after such publication. Moreover, it necessarily follows that if the Commission has discretion initially to set the effective date more than thirty days after publication, it has the discretion to defer an initial effective date to beyond thirty days.¹⁰

Given that it has the authority, there is no reason the Commission should not exercise that authority in this case. CTIA and GTE have both presented compelling showings of the disruptions to pro-competitive and pro-consumer marketing activities that will be caused if the rules were to go into effect, as well as the likelihood that the rules could be modified on further review. As discussed above, the current deadline also creates massive compliance complexities. Moreover, there is nothing particularly significant or magical about the current effective date. The fact that the current effective date falls on May 26 is more a function of happenstance than it is any function of a need for effectiveness by that date. Indeed, the Commission was under no statutory obligation to have rules in place by any date certain, or even to adopt rules at all. Under these circumstances, BellSouth agrees that a deferral of the effective date is appropriate.

To the extent the Commission considers its rules merely to be an articulation of requirements already embodied in the Act that cannot be deferred, BellSouth agrees with GTE that forbearance from those requirements is warranted. For each of the circumstances addressed

⁹ 5 U.S.C. § 554(d).

¹⁰ As CTIA points out, the Commission has previously asserted its "broad discretion to designate the effective dates of its actions." CTIA Petition at n.6 (citing *Addition of New Section 1.103 to the Commission's Rules of Practice and Procedure*, 49 RR2d 225, 226 (1981)).

in its petition, GTE has shown that forbearance would meet the three part test of Section 10.

Further, BellSouth agrees that the Commission has the authority to forbear *temporarily*, pending further proceedings. Clearly, if the Commission has authority under Section 10 to forbear permanently, it has the lesser authority to forbear for a shorter term.

Finally, BellSouth agrees that the Commission has the alternative authority to stay the effectiveness of its rules and that GTE has met the standard for justifying a stay. Further, as GTE shows, the Commission has previously stayed newly adopted rules based on a public interest standard without directly applying the four-part test of *Virginia Petroleum Jobbers*.¹¹ BellSouth agrees with GTE that the present circumstances clearly meet that standard and warrant a stay.

III. CTIA and GTE Have Provided Good Cause for Relief From Rule 64.2005(b)(1) for CMRS Providers.

CTIA and GTE both have requested interim relief for CMRS providers from the requirements of Rule 64.2005(b)(1), which prohibits carriers from using CPNI to market CPE or information services without the customer's affirmative approval. Although BellSouth does not believe that relief should be limited to CMRS providers, as CTIA's petition might suggest, BellSouth agrees that relief for CMRS providers is warranted.

The basis of Rule 64.2005(b)(1) is the Commission's conclusion that CPE and information services are not part of a customer's "total service relationship" with a carrier and are not "necessary to, or used in" the provision of a telecommunications service.¹² The two

¹¹ *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

¹² *Second Report and Order* at ¶ 71. See also, 47 C.F.R. § 64.2005(b)(1) (Appendix B to *Second Report and Order*).

petitioners together make a substantial showing, however, that CPE and information services *are* part of the CMRS service provided to customers whether considered from a technological, marketplace, or customer perception perspective.

From a technological perspective, CMRS equipment must be specifically programmed with appropriate identification information and other authentication and security codes in order to operate with the CMRS network. Further, digital technology provides the capability for delivery of information and data services to CMRS subscribers using the same radio spectrum as voice services. Moreover, as CMRS carriers migrate from analog to digital transmission, customers are *required* to have new compatible equipment.

From a marketplace perspective, CMRS providers do not make artificial distinctions between various functionalities of their offerings when promoting them in the marketplace. Rather, the marketplace objective is to create a customer perception of a singular service that offers a variety of options all in a neat service package. Indeed, the CMRS service and the associated equipment are so linked in the marketplace that CMRS carriers market their services by touting the features of the equipment.¹³

Finally, CMRS services (including voice messaging) and equipment are inseverably intertwined in customers' perceptions. Customers shopping for CMRS service overwhelmingly go to CMRS retail outlets where they can view and handle handsets as they mull over their subscription choices. Only in the rarest of circumstances (if any) would a customer subscribe to CMRS and then set about to find CPE that would be most useful with the services ordered.

¹³ Examples of CMRS providers promoting "one-button" features or audio messaging capabilities of CPE to promote the associated service are included in Attachment A, hereto.

Rather, customers view the handset and the package of services ordered as the “service” obtained from the CMRS provider.¹⁴

Application of Rule 64.2005(b)(1) would seriously disrupt this integrated service relationship. For example, as both GTE and CTIA point out, the effect of the rule would seem to preclude CMRS carriers from using CPNI (absent affirmative approval) to target high usage customers for upgrade from analog to digital service if the digital service offering were packaged with the necessary new digital CPE. Yet, if a consumer’s privacy expectation is not infringed by the use of CPNI to identify them as a candidate for service upgrade (as the Commission has determined it is not), one is hard pressed to understand how inclusion in the service proposal of the CPE necessary to make the service work would create such an infringement.

In light of this integrated service relationship and the disruption the application of Rule 64.2005(b)(1) would foster, BellSouth supports the petitioners’ request for relief pending further consideration of these issues.

IV. Relief From Rule 64.2005(b)(1) should Be Granted For Wireline Carrier’s Offerings of Voice Messaging Services and Specialized CPE.

GTE asserts that the Commission should grant interim relief from Rule 64.2005(b)(1) for wireline carriers’ offerings of information services, such as voice messaging, and of CPE used for advanced telecommunications services, such as ADSL. BellSouth concurs, but urges the Commission to extend the relief to include other specialized CPE, such as that used in caller ID services.

¹⁴ Indeed, as CTIA points out, this Commission, DOJ, and FTC all have concluded that consumers not only expect, but *benefit*, from marketing of CMRS and associated CPE as a single package. CTIA Petition at 18-19.

As the Commission has recognized, Section 222(c)(1) is primarily designed to respect customers' privacy expectations within a total service relationship. Accordingly, the Commission's interpretation of that section must be consistent with those expectations. Thus, the Commission has rightly concluded that customers have an expectation that a carrier will have access to and will use CPNI to market *additional* telecommunications services within the service relationship. Necessarily, customers also have the expectation that carriers may have access to and may use CPNI to market whatever is necessary to make the services within the existing relationship *work*, such as specialized CPE, or work *better*, such as voice messaging services.

Thus, BellSouth believes the Commission unnecessarily and erroneously excluded information services such as voice mail from the scope of the customer's "total service relationship" with a carrier. From a customer perspective, voice messaging service is simply another tool available to the customer to manage use of his or her telephone service. In this respect, it is no different in the customer's mind from other service control techniques, such as call waiting or call forwarding. Like these other services, voice messaging provides the user a means to control where, when, and to whom they will speak and facilitates receipt and delivery of messages via telecommunications service. Moreover, because of the integral relationship between call forwarding features and voice messaging, customers necessarily perceive these features to be part and parcel of the same offering. Thus, BellSouth agrees with GTE that voice messaging is a "service" that is part of a customer's total service relationship with a carrier or, at a minimum, is necessary to or used in the provision of such services.

Specialized CPE is similarly integral to the offering of certain telecommunications services. For example, GTE shows that specialized ADSL modems must be utilized for customers to receive any benefit from the ADSL service. Similarly, caller ID service necessarily

entails the use of a display device for the service to be of any value. Such specialized CPE is at least as “necessary to” or “used in” provision of the associated telecommunications service as is inside wire, which the Commission has already concluded is within the scope of Section 222(c)(1)(B), because such equipment is a necessary component of the carrier’s ability to provision the specific service ordered.¹⁵

Moreover, as with CMRS CPE, the utility of a service is often most easily demonstrated through promotion of the device associated with it. Thus, targeted promotions of caller ID service almost always depict the caller ID device as a way of demonstrating what the user of the service will see in a display screen. Customers visualize the service through such physical representations. In customers’ minds, the device and the functionality it facilitates are one in the same.

Finally, as with CMRS, the Commission has determined that use of CPNI within the total telecommunications service relationship to identify candidates for a new or specialized service is consistent with customers’ privacy expectations. There is simply no reason to believe that inclusion in the new service proposal of the CPE necessary to make the service work would

¹⁵ The Commission’s interpretation in the *Order* that CPE is not a “service” under Section 222(c)(1)(B) is a too literal reading of that word. That section itself refers to publishing of directories as an activity for which access to CPNI is permitted without customer approval. The “publishing” of directories is hardly a useful activity unless the tangible directories are also distributed to users of telecommunications services. Thus, the exception for the “service” of publishing directories in Section 222(c)(1)(B) necessarily involves distribution of the physical product. Likewise, the carrier’s offering of the CPE device that the user needs to utilize a specific telecommunications service is just as much a “service” as is the publishing and distribution of a directory. In any event, by concluding that inside wire installation, maintenance, and repair may be provided by carriers under Section 222(c)(1)(B), the Commission has already confirmed that the provision of tangible equipment (*e.g.*, wire) in conjunction with a service does not conflict with the “service” language of Section 222(c)(1)(B). There is no reason for the Commission to treat specialized CPE any differently.

infringe on that expectation. Thus, specialized CPE should not be deemed to be excluded from the customer's total service relationship.

Because of these compelling considerations that the Commission will have before it on reconsideration or in other proceedings, the Commission should grant interim relief from Rule 64.2005(b)(1) for carriers' marketing of voice messaging and specialized CPE lest the effect of that rule severely disrupt customers' expectations of carriers' abilities to meet their needs.

V. The Commission Should Grant Interim Relief From Rule 64.2005(b)(3), Which Prohibits Use of CPNI to Regain Lost Customers.

Both petitioners ask the Commission to lift the prohibition on use of CPNI in "winback" situations, pending further review of the issues associated with such a prohibition. BellSouth agrees. The prohibition is antithetical to the Act's overarching goal of facilitating and stimulating competition between carriers. The prohibition does nothing but deprive American consumers of the benefits of actual head-to-head competition. Further, as GTE points out, the rule improperly deprives carriers of the beneficial use of their business assets. Accordingly, the Commission should grant relief from this requirement pending further review.

In practice, the present requirement will retard competition at one of its most crucial moments, *i.e.*, when a customer is on the precipice of choosing between competing offers.¹⁶ The requirement will effectively prevent the customer from obtaining from the original carrier an informed alternative proposal. Rather than prohibiting a carrier from using CPNI to provide a

¹⁶ As the petitioners observe, the rule only refers to "former customers," while the text of the *Order* suggests the prohibition is intended also to reach "soon-to-be former customers." In either case, the opportunity lost for a carrier to propose an improved service package based on a past service relationship will be an opportunity lost for the customer to make an informed purchasing decision.

competitive offer to customers, the Commission ought to be encouraging such behavior in the spirit of vigorous competition.

That a customer has left a carrier does not support the Commission's interpretation that the customer no longer expects the former carrier to have access to CPNI. Indeed, that a customer has changed carriers is indicative of the customer's desire to obtain service from the carrier that can offer the best telecommunications solution for that customer's needs. A customer demonstrating a willingness to change carriers to achieve a better solution is a customer demonstrating a willingness to entertain offers to change carriers again. The Commission should not impose artificial constraints on the use and flow of information in a competitive market on the basis of unsupported assertions that customers expect and would be satisfied by something less.

In addition to defeating customers' expectations, the prohibition also operates to deprive carriers of lawful use of their business assets without just compensation. CPNI has value to the carrier based on the investment expended to generate, collect, compile, and protect it and on its potential use in the generation of future revenues. Restricting a carrier from using this information to contact former customers deprives carriers of the realization of that value. As GTE posits, such a restriction constitutes an impermissible taking of property without just compensation.


In light of these infirmities of Rule 64.2005(b)(3), BellSouth supports GTE's request for forbearance or stay pending final disposition on the merits.

CONCLUSION

Because of the disruptions Rules 64.2005(b)(1) and (b)(3) are destined to cause, the likelihood that these rules may be modified or eliminated on further review, and the complexities of implementing these requirements by May 26, BellSouth urges the Commission to grant the petitioners' requests for interim relief from these rules pending the Commission's further consideration of these rules on the merits.

Respectfully submitted,

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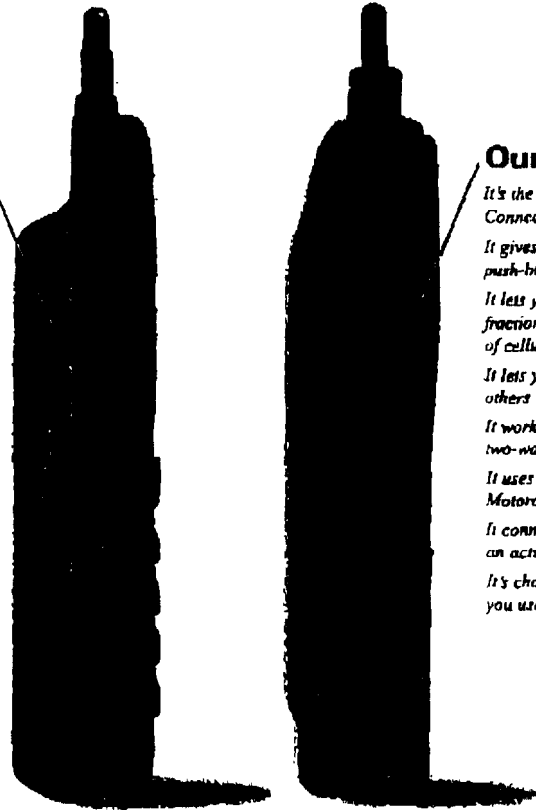
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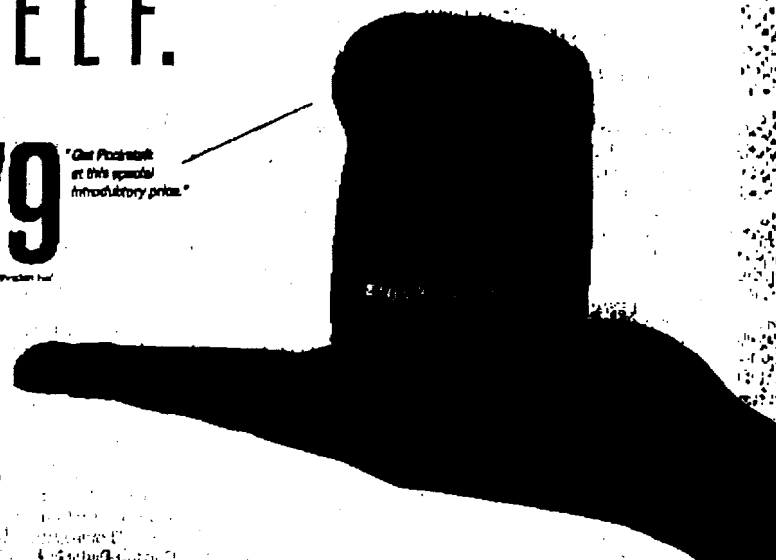
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I do hereby certify that I have this 8th day of May, 1998, served all parties to this action with a copy of the foregoing COMMENTS by placing a true and correct copy of same in the United States Mail, postage prepaid, addressed to the parties listed below:

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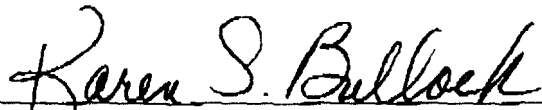
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